No. 15446 (In Admiralty)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator
of the Estate of Maria G. Muna,
deceased, et al,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC.,
a corporation, et al,

Respondents.

APPELLANTS' OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
HON. THURMOND CLARKE, JUDGE

A. J. BLACKMAN
315 West Ninth Street
Los Angeles 15, California

Attorney for Appellant.

No. 15446 (In Admiralty)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator
of the Estate of Maria G. Muna,
deceased, et al,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC.,
a corporation, et al,

Respondents.

APPELLANTS' OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
HON. THURMOND CLARKE, JUDGE

A. J. BLACKMAN
315 West Ninth Street
Los Angeles 15, California

Attorney for Appellant.

TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes and Texts

No. 15446 (In Admiralty)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator of the Estate of Maria G. Muna, deceased, et al,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, et al,

Respondents.

APPELLANTS' OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an action for damages for the wrongful death of three fare-paying passengers killed in the crash of a DC-6 aircraft, N 90806. Respondent Transocean Air Lines, Inc. (hereinafter sometimes called "Transocean") owned and operated the aircraft. Respondent Slick Airways, Inc. (hereinafter sometimes called "Slick") maintained it, and Douglas

Aircraft Company, Inc. (hereinafter sometimes called "Douglas") manufactured it.

The crash occurred in the Pacific Ocean approximately 340 miles east of Wake Island. The District Court had jurisdiction under the provisions of the Death on the High Seas Act, 46 U. S. C. 761-767. As against Transocean, the pleadings so allege (V. 1, R. 2, 5 and 10). [1/] As against Slick (sued as Doe Four), jurisdiction originally was asserted upon the basis of diversity of citizenship (28 U. S. C. 1332) (V. 1, R. 4, 7, 11). Although filed on the law side, the action was transferred to the admiralty side of the docket by orders of the court dated December 16, 1954 and January 10, 1955 (Supplemental R. 11, 16). Thereafter the matter was tried in admiralty, without a jury, before the Honorable Thurmond Clarke.

Both in pre-trial proceedings and at the outset of trial, plaintiffs contended that the doctrine of res ipsa loquitur was applicable as against the air carrier and maintenance company (V. 1, R. 37; R. 4, 35). After the trial court indicated its belief that res ipsa loquitur did not apply in admiralty (R. 90),

---

1/ References to the Record are designated "R. ____". The Record herein comprises 5 volumes. Volume 1 contains the Clerk's transcript, and Volumes 2 to 5 contain the Reporter's transcript of trial proceedings. Since both Volumes 1 and 2 commence numbering with Page 1, references to pages in Volume 1 will expressly indicate that volume by "V. 1".

plaintiffs put in evidence specific acts tending to show negligence. On their part, defendants offered no evidence to explain the cause of the crash. Nevertheless, the Court gave judgment for defendants (V. 1, R. 51), from which plaintiffs filed notice of appeal. While Douglas is a respondent herein, it has been joined only so that the Court can have all parties before it (V. 1, R. 57).

Jurisdiction of this Court is conferred by 28 U. S. C. 1291 and 2107.

STATEMENT OF THE CASE

On July 12, 1953, at 0004 [2/] DC-6 Aircraft N 90806 departed Guam eastbound for Oakland as Flight 512, carrying 49 passengers and a crew of 8 (R. 53). Intended en route stops were Wake Island and Honolulu (R. 53). The flight landed at Wake at 0539, refueled, and departed at 0658. 50 passengers were then aboard, including Maria G. Muna, Francisco G. Muna, and Catalina Manalisay Guiterrez (R. 54). The persons named were passengers for hire who had boarded the aircraft

---

2/ Unless otherwise stated, all times are stated in terms of Greenwich Civil Time and on the 24 hour clock. This is for the reason that the geographical places involved are located in different time zones. Conversions from Greenwich Civil Time to local standard time may be made as follows: Oakland, minus 8 hours; Honolulu, minus 10; Wake Island, plus 12; Guam, plus 10.

at Guam (R. 54).

At 0729 Flight 512 radioed a 100 mile east position report, notifying that it had reached its assigned cruising altitude of 15,000 feet two minutes earlier (R. 57). At 0828 the aircraft radioed that it was cruising at 15,000 feet between cloud layers (R. 58). The message included no report of any turbulence or weather phenomena, and no indication of any difficulties (R. 58). This was the last radio contact with the flight (R. 58).

Approximately 12 minutes thereafter, N 90806 crashed into the Pacific Ocean, killing all 58 occupants (R. 59). A search for the aircraft resulted in recovery of some wreckage and floating bodies.

Douglas manufactured N 90806 in 1949 as its first DC-6 model (R. 42). In April, 1951, it sold the aircraft to Slick (R. 42-43). Slick operated it as a cargo-type aircraft until about June 26, 1952, when it installed a passenger interior and sold the plane to Transocean (R. 43-44).

Transocean operated N 90806 at all times thereafter in flights between all or some of the following points: Burbank, Oakland, Honolulu, Wake Island, Guam, and Tokyo (R. 44). In such operations, Transocean acted as a common carrier (R. 44) under its authority from the Civil Aeronautics Board as a large irregular (nonscheduled) air carrier (R. 356-7).

During this period Slick performed maintenance from time to time on N 90806, at Burbank, under a written contract with Transocean. By this contract, Slick undertook to maintain the airplane in airworthy condition, for which Transocean agreed to pay Slick $101.00 to $115.00 per hour of aircraft operation, this being in excess of $23,000 per month (R. 45, P's Ex. 6).

Appellant is the administrator of the estates of Maria G. Muna, her son, Francisco G. Muna, and Catalina Manalisay Guiterrez (R. 345). Maria G. Muna was 51 years of age (R. 615) [3/], and left surviving her four daughters, a son Jesus, age 15 (R. 576), and her mother, Maria Tiron Gutierrez, age about 78 (R. 468). Two of the daughters, Flora Santos, age 27 (R. 444), and Geneveva Adawag, age 24 (R. 507), are married; Dorothy, age 17 (R. 577), and Mariguita, age 12 (R. 576), are unmarried.

Catalina Manalisay Guiterrez was 23 years of age (R. 380), unmarried (R. 386), and left as her heirs at law her father, Jesus T. Gutierrez, age 47 (R. 378), and mother, Maria M. Gutierrez, age 44 (R. 378); two adult brothers, Domingo, age 25, and Felipe, age 21 (R. 380), and two sisters, Ignacia, age 24 and unmarried (R. 383), and Lourdes, age 7 (R. 379). Jesus T. Gutierrez and Maria G. Muna were brother and sister (R. 422).

3/ All ages stated are as of July 12, 1953, the date of crash.

Francisco G. Muna was age 9 (R. 444), and left as his heirs his brother and sisters in the Muna family above. The members of both families are American natives of Guam (R. 607). This action is for the benefit of the foregoing heirs at law.

QUESTIONS PRESENTED

I.

The basic issue involved in this appeal is whether the doctrine of res ipsa loquitur applies against an air carrier and maintenance firm, or either, sued in admiralty for the death of a passenger in an airplane crash on the high seas. The District Court apparently decided this issue in the negative. Since Respondents offered no evidence tending to show the cause of the crash, the judgment in their favor is explainable on no other basis. Appellants contend that the issue should be resolved in the affirmative.

II.

Alternatively, this appeal presents the question of whether Appellants are entitled to judgment by reason of the clear preponderance of evidence. The trial court answered "No". Under the rule of trial de novo in Admiralty appeals, we believe this evidence should be reweighed by the Circuit Court, and the question answered "Yes".

SPECIFICATION OF ERRORS

1. The District Court erred in failing to give plaintiffs the benefit of the doctrine of res ipsa loquitur.

2. If the District Court did give plaintiffs the benefit of the doctrine, it erred in failing to give judgment for plaintiffs.

3. Irrespective of res ipsa loquitur, the District Court erred in failing to give plaintiffs judgment by reason of the clear preponderance of evidence.

4. The District Court erred in making certain findings of fact which are not supported by evidence.

5. The District Court erred in failing to make findings of fact and conclusions of law in respect to issues of whether or not plaintiffs were entitled to recover for loss of baggage and amounts paid for tickets.

SUMMARY OF ARGUMENT

In The Silverpalm, (C. A. 9), 79 F. 2d 538, This Court stated that in a case of novel impression based upon newly created statutory rights in admiralty, the long established administrative practice of writing an opinion is recommended to the District Court. We concede that this case is such. Yet

because no opinion accompanied the judgment below, it is necessary in our discussion here to assume, first, that we did not receive the benefit of the doctrine of res ipsa loquitur, and second, if we did receive it we should have recovered judgment. We did request the trial judge to include in the record a statement of decision as to whether or not it applied the doctrine in arriving at its judgment (R. 53). The request was denied (R. 56), although at one stage during the trial proceedings the Court stated that the doctrine did not apply (R. 90).

Accordingly, Point I of our argument demonstrates that the doctrine is applicable as against Transocean as an air carrier, and Slick as a maintenance company performing the non-delegable duty of maintaining N 90806 for the air carrier. We then show by cases construing related Acts that res ipsa loquitur is authorized under the Death on the High Seas Act.

Point II illustrates that with res ipsa, appellants are entitled to judgment. This is so primarily because respondents introduced no evidence of any kind to explain the crash or to show due care in all respects which could have caused it. In fact, respondents stipulated that they "are not aware of any facts which reasonably could have caused this accident, and intend to offer no evidence tending to show such cause." (R. 36-37). Secondarily, we show that the inference raised by res

ipsa is not dispelled by the presumption of due care, if any, on the part of the deceased pilots, because the inference blankets every kind of act or omission which could have caused the crash, not only the conduct of the pilots. We point to Des Marias v. Beckman, (C. A. 9) 198 F. 2d 550, and Haasman v. Pacific Alaska Air Express, 100 F. Supp. 1, as squarely in point. Also, we show that the inference is not dispelled by our introducing specific acts of negligence under the authority of Leet v. Union Pacific R. R. Co., 25 Cal. 2d 605, cert. denied, 325 U. S. 866.

In Point III, we call attention to some of these specific acts of negligence. We do this under the rule in admiralty appeals which gives this court the power to reweigh the evidence as in a trial de novo. As against Transocean, we point out faulty maintenance of the auto pilot, an instrument system which is highly critical to flight control and is usually engaged at cruising altitudes in long over-water flights. We point to inadequate pilot training, including the failure of both pilot and co-pilot on N 90806 to take important and required training in emergency procedures. Next, we point to scheduling pilots for duty an excessive number of hours, thereby inducing fatigue. In this specification we show that the flight crew of N 90806 had been on duty approximately 28 hours out of the last 42, and according to the expert opinion of a specialist in the physiology of aviation medicine, the pilots

were in a state of fatigue at the time of the crash. In the opinion of the same expert, they had inadequate rest on the ground at Guam (less than 14 hours after a flight of over 14 hours from Honolulu), and inadequate rest facilities aboard the airplane (1 crew bunk for 7 male flight crew members). We then show by the testimony of Transocean's own vice-president in charge of operations that it would have been good practice for the air carrier to change crews at Wake Island, although this was not done here. Two other pilot expert witnesses corroborated the value of such a crew change. Finally, we show that prior to the last take-off from Wake Island the captain failed to complete and leave on the ground a written pre-flight check list as required by Civil Air Regulations and the carrier's own manual. The crash followed shortly thereafter.

As against Slick, specific acts of negligence include, first, records of omitted test flights. As a result of these, discrepancies or "squawks" were corrected by personnel at other stations, or not at all. We next show where important aircraft components have operating limitations in terms of so many hours of permitted operation. It is both sound practice and required by Civil Air Regulations (hereinafter called "C. A. R.") to abide by these limitations, yet in at least one instance involving a vital auto pilot amplifier, Slick failed to

do so. A malfunction of the gyro in this unit would cause a violent reaction to the aircraft. Finally, we show other instances where Slick omitted maintenance, or did it in such a manner as to fail to eliminate the flight squawks which gave rise to the work.

In Point IV we call attention to certain findings made by the trial court which are unsupported by the evidence. In Point V we show where we were entitled to recover in any event for the value of our decedents' lost baggage and fares paid for transportation never received. Evidence of these items was introduced, and as to baggage the carrier is a virtual insurer. Nevertheless, the trial court made no findings to dispose of these items.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN FAILING TO GIVE APPELLANTS THE BENEFIT OF RES IPSA LOQUITUR.

A. As Against Transocean.

1. Operational Fault. Generally, the courts have applied the rule of res ipsa loquitur in favor of passengers of air carriers. As early as 1932 the California court adopted

the rule in Smith v. O'Donnell, 215 Cal. 714, stating (p. 720):

". . . It may safely be asserted that there is no mode of transportation where the passenger's safety is so completely entrusted to the care and skill of the carrier. To indulge for a moment in the speculation which follows in the wake of the statement just made, if there are those in the business of carrying passengers in the air to-day (and we do not say there are) who are sufficiently unmindful of their humanitarian duty as to neglect to employ the utmost care in the selection and operation of their craft, the industry and the public both will benefit by the application of a rule of liability which will either require such care or ultimately eliminate them from this field of service."

The rule in England is the same. In Fosbroke-Hobbes v. Airwork, Ltd., 1 All. E. R. 108 (1937); 1 Avi. 663, 664, the following appears:

"It was argued that I ought not to apply this doctrine to an aeroplane, a comparatively new means of locomotion, and one necessarily exposed to the many risks which must be encountered in flying through the air, but I cannot see that this is any reason for excluding it. Large numbers of aeroplanes are daily engaged in carrying mails

and passengers all over the world, and, as is well known, they arrive and depart with the regularity of express trains. They have indeed become a common-place method of travel, supplementing, though not superseding, rail and sea transport. Railways were just as great an innovation when they took the place of the stage coach, yet the courts found no difficulty in applying to them by the year 1844 the same doctrine that had formerly been applied to stage coaches: Carpue v. London & Brighton Ry. Co. (1)."

Likewise in Canada, where the court in Malone v. Trans Canada Airlines (1942) Ont. R. 453, 3 DLR 369, states:

"With experienced and careful pilots and proper equipment, a passenger has the right to expect that he will be carried safely to his destination."

Whether on land or sea, crashes are not ordinary perils of air travel. As stated in U. S. v. Kesinger, 190 F. 2d 529 (Cir. 10), 3 Avi. 17, 609, 10:

". . . An airplane of a proven safe type of design taking off for an ordinary routine flight under normal weather conditions does not crash in the ordinary course of things, unless there has

been a failure to properly inspect, service and maintain it, or unless it is not operated with due care."

This is all the more true where, as here, the record shows without contradiction that:

(1) There was no evidence of sabotage (R. 359, 60);

(2) Weather was not a factor (good weather forecasted - R. 55; radio reports received after Wake departure made no reference to turbulence or other weather phenomena, and described flight cruising "between cloud layers" - R. 58).

(3) A Pan American Airways aircraft flying at 7,000 feet followed N 90806 through the same airway without difficulty or unusual weather (R. 75, P's Ex. 4).

Nor does inability to show the specific cause of the crash preclude application of res ipsa. Recognizing this, the doctrine was applied in 1951 to the unexplained disappearance of a commercial airliner while on a flight from Yakutat, Alaska to Seattle (Beckman v. Des Marias, Haasman v. Pacific Alaska Air Express, Inc., Manders v. Pacific Alaska Air Express, Inc., 100 F. Supp. 1, affirmed in 198 F. 2d 550 (C. A. 9), cert. denied. (1953) 344 U. S. 922). There, as in the instant

case, the action was by personal representatives, suing for the death of their decedents, passengers on the plane. We believe that these cases are persuasive authority before this Court.

2. Maintenance Fault. Transocean's duty extends not only to proper operation of the airplane, but also to its proper maintenance. The fact that all the major maintenance was done by Slick (R. 255) does not relieve Transocean of the responsibility therefor. Maintenance of an aircraft is always the primary responsibility of the air carrier, irrespective of who actually does it.

C. A. R. §42.30 provides:

> "No person shall operate an aircraft which is not in an airworthy condition. . . . "

10 Am Jur. 104 states:

> "The duty of a common carrier of passengers to exercise the requisite degree of care for those it undertakes to transport upon its facilities is non-delegable, so that a passenger who sustains injuries because of the fact that such degree of care was not exercised is entitled to hold the carrier responsible, notwithstanding the accident is directly attributable to the negligence of an independent contractor."

DeVito v. United Airlines, Inc., 98 Fed. Supp. 88 (D. C. N. Y.) involved the crash of a DC-6 at Mt. Carmel, Pennsylvania. There, Douglas failed to inform United that carbon dioxide discharged in the baggage compartment could enter the cockpit and overcome the pilots. After discussing Douglas's negligence, the court states:

> "As to the defendant, United, the question of its liability to the plaintiff must be considered in the light of the duty it owed to its passengers to use the highest care in the maintenance and the operation of its airplanes . . . United contends that it relied upon Douglas and that failure to prevent hazardous carbon dioxide concentrations from entering the cockpit was negligence on the part of Douglas. Insofar as concerns its duty to its passengers, however, United's reliance upon Douglas would not lessen the duty owed."

Likewise in the instant case the fact that Transocean relied, if at all, upon Slick's performance of its contractual obligations to maintain N 90806 in airworthy condition in no way lessened Transocean's duty of care to its passengers.

B. As Against Respondent Slick.

For maintenance purposes, N 90806 was flown to Slick's shops at Burbank (Flight logs, D's Ex. G, H). One of

Transocean's department heads (R. 208) testified that "Slick did all the major maintenance" on the airplane (R. 255). Although the record shows that some maintenance work was performed by Transocean in Oakland (e.g., R. 51, 217, 239), it does not appear that this in any way changed the obligations Slick assumed under its contract. Those obligations imposed a duty of care not only in favor of Transocean, but also passengers on N 90806 for whose benefit safetywise performance was intended (Dahms v. General Elevator Co., 214 Cal. 733; Cowles v. Independent Elevator Co., 22 Cal. App. 2d 109; Restatement, Torts, §404, page 1092).

By the contract Slick agreed to maintain N 90806 in airworthy condition (R. 45). In Webster's New International Dictionary (1939) "airworthy" is defined as follows: "Fit for operation in the air; able to bear the strains of flight, to withstand storms, etc., as an airplane." By the same contract Slick agreed that "All services . . . shall be done in a good and workmanlike manner and shall comply with requirements of C.A.A." (P's Ex. 6). C.A.R., §18. (14 C.F.R.) defines maintenance as follows:

> "Maintenance, which includes preventive maintenance, is the inspection, overhaul, repair, upkeep and preservation of airframes, powerplants, propellers, and appliances, including the replacement of parts."

§18.30 provides:

"All maintenance and repair shall be accomplished in such a manner and the materials used shall be of such quality and strength that the condition of the part of the aircraft on which such work has been performed shall, with regard to aerodynamic and mechanical function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness, be at least equivalent to its original or properly altered condition."

In the instant case, the parties stipulated that the Douglas DC-6A aircraft was designed, engineered and manufactured as a fail-safe airplane, and that it is in current use by many of the larger scheduled airlines throughout the world with generally satisfactory operating results (R. 177). It follows that had Slick properly performed its maintenance duties on N 90806, the airplane would have been "at least equivalent to its original or properly altered condition", i.e., a fail-safe airplane.

But the fact appears otherwise. Michael Gerundo, M.D., Medical Examiner of Guam, performed autopsies upon the bodies recovered from the crash (R. 183), some 14 in number (R. 185). He was an experienced pathologist (R. 181). His

conclusions, based upon medical evidence, furnish the only known reliable indication of some of the factors that did or did not exist aboard N 90806 at the time of the accident. Some of these were that:

(a) There was no fire or explosive action (bodies were not burned - R. 184);

(b) There was no unusual weather (R. 187) (seat belt lacerations absent from all except three victims - R. 186-6);

(c) The airplane nose-dived almost perpendicularly into the ocean (fractures found could be referable only to such an attitude - R. 189).

We doubt that respondents seriously can contend that N 90806 in its "original or properly altered (maintained) condition" would suddenly nose-dive or otherwise crash into the sea, barring fault. Such a catastrophe speaks for itself that improper maintenance or improper operation, or both, caused it.

In Zentz v. Coca Cola, etc., 39 Cal. 2d 436, 446, the Court states:

"(A)s a general rule, res ipsa loquitur applies where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone

and the defendant is probably the person who is responsible."

In the instant case it is clear that the balance of probabilities point to negligent maintenance as at least one cause of the accident. In Johnson v. U. S., 333 U. S. 46, the Court states:

> "No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events."

Applying the doctrine as against Transocean in no way precludes its application as against Slick. Two parties having control can properly be called upon to give an explanation of their conduct (Ybarra v. Spangard, 25 Cal. 2d 486; Stanford v. Richmond Chase Co., 43 Cal. 2d 287). Moreover, the fact that the accident occurred some time after Slick relinquished control to Transocean does not debar the doctrine. If the condition of the instrumentality was not otherwise changed in the meanwhile, responsibility remains (Zentz v. Coca Cola, etc., 39 Cal. 2d 436).

The theory of retained control was applied to an elevator maintenance company which had exclusive charge of repair and inspection in Dahms v. General Elevator Co., 214 Cal. 733.

In Hercules Powder Co. v. Automatic Sprinkler Corp., 151 A. C. A. 417 (1957), Automatic installed a sprinkler system

in plaintiff's building and inspected it about every six months, although it had no contract for maintenance. Hercules also did some work on the system. A fire ensued in which the building was damaged. Some of Hercules' employees were injured. They joined as plaintiffs. The trial court refused res ipsa and judgment was for defendant Automatic. Held, reversed on that ground as against all plaintiffs. The Court states (page 425) that the employee plaintiffs "properly rely on Hardin v. San Jose City Lines, Inc., 41 Cal. 2d 432 (260 P. 2d 63); Stanford v. Richmond Chase Co., 43 Cal. 2d 287 (272 P. 2d 764); Raber v. Tumin, 36 Cal. 2d 654 (226 P. 2d 574); Summers v. Tice, 33 Cal. 2d 80 (199 P. 2d 1, 5 A. L. R. 2d 91), to argue that as to them the instrumentality which caused the accident was in the control of, either Hercules or Automatic or both, and the accident could have been caused by the negligence of either or both, and that the facts that respondents blame Hercules for the accident does not preclude the application of res ipsa loquitur to the individual appellants, as they are entitled to their own theory of causation and can recover."

We submit that the instant case against Slick is even stronger, where its duty was defined by a written contract, and its contact with the airplane was much more frequent. Moreover, Slick was under an affirmative duty to inspect (C. A. R., §18. 30). In Zentz v. Coca Cola, etc., 39 Cal. 2d 436, 449, the Court says that "if defects develop in used bottles

which are not discoverable upon visual inspection, there is a duty upon the bottler of carbonated beverages to make appropriate tests before they are refilled, and that if such tests are not commercially practicable the bottles should not be re-used. The only suggested possible cause of the defective condition of the bottle which might not be attributable to defendant's negligence is that the bottle may have been a new one and may have contained latent defects which the bottler had no practicable means of discovering. (See Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 460 (150 P. 2d 436); Honea v. City Dairy, Inc., 22 Cal. 2d 614, 618-621 (140 P. 2d 369).) It is our opinion, however, that the existence of this possibility is insufficient to prevent application of the doctrine of res ipsa loquitur."

The degree of care and inspection required of a bottler certainly should be no greater than that required of a firm which has assumed a contractual obligation to maintain a DC-6 airplane used in common carriage of passengers. We submit that the doctrine of res ipsa should be applied as against the maintenance company, Slick.

C. Under Death on the High Seas Act (D. H. S. A.).

The Death on the High Seas Act, 46 U. S. C. A. 761-767, was adopted March 30, 1920, and provides in part (§ 761) as follows:

"Whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty . . . "

It is true that this Act created a right where none existed before (Batkiewicz v. Seas Shipping Co., 54 Fed. Supp. 789). However, it is subject to construction by principles of admiralty law (The Friendship II, 113 Fed. 2d 105), including those principles which relate to maritime torts in general.

The doctrine of res ipsa loquitur is not new or novel in admiralty. It has been applied to cases arising under the Jones Act (46 U. S. C. A., §688) both in situations where negligence caused injury to a seaman (Jones v. Reading Co., 45 Fed. Supp. 566, D. C. E. D. Pa.; Lejuene v. Gen. Pet. Corp., 128 Cal. App. 404; Carlson v. Wheeler-Hallock Co., 137 P. 2d 1001 (Ore.)) and in situations where death ensued (The Columbia, 25 Fed. 2d 516, D. C. S. D. N. Y.). Its application in such a case, in admiralty, has had the express approval of the Supreme Court in Johnson v. U. S., 333 U. S. 46, where it states (page 49):

"The Jones Act makes applicable to these suits the standard of liability of the Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C. §51."

The Act last cited affords a remedy for injury or death of railroad workers "resulting in whole or in part from the negligence" of the railroad.

In Pitcairn v. Perry, 122 Fed. 2d 881 (C. A. 8), the Court states:

> "The contention made by defendants that the doctrine cannot be invoked in an action based upon the Federal Employers' Liability Act is determined by this court adversely to their contention in Terminal Railroad Association v. Staengel, supra, (122 F. 2d 271, 273, C. A. 8) where it is said: 'Tested by the above considerations on the fact situation above outlined, this is a res ipsa loquitur case. This is directly ruled by Southern Ry. (Carolina Division) v. Bennett, 233 U. S. 80, 34 S. Ct. 566, 58 L. Ed. 860'"

If both Federal Employers' Liability Act and Death on the High Seas Act speak of negligence and res ipsa applies in the former, there is no sound reason why it should not apply in the latter Act.

The Jones Act applies only to seamen. In the Death on the High Seas Act, "Congress was also affording a remedy for an additional class of beneficiaries." (The Four Sisters, 75 Fed. Supp. 339, D. C. D. Mass.) There appears no reason to

impute to Congress the unjust intent to grant res ipsa to seamen and at the same time to deny it to passengers. The fact that Death on the High Seas Act affords a cause of action for one's "wrongful act, neglect or default" would appear to broaden, not narrow, the protection intended to be afforded to passengers. Indeed, the language is consistent with the broad liability imposed upon carriers for default of their contractual obligation of carriage irrespective of negligence.

II.

IF THE DISTRICT COURT DID APPLY RES IPSA LOQUITUR, IT ERRED IN FAILING TO GIVE JUDGMENT FOR APPELLANTS.

A. No Affirmative Showing to Rebut Inference.

The pre-trial Order in this case (V. 1, R. 36-37) recites:

> "It has been stipulated in conference that defendants are not aware of any facts which reasonably could have caused this accident, and intend to offer no evidence tending to show such cause."

At trial, this stipulation was referred to in Appellants' opening statement (R. 4). It was never modified, and to our knowledge Respondents have never offered any evidence tending

to show the cause of crash of N 90806.

In his final argument, counsel for Transocean admitted that they "do not know what happened" (R. 859). He did hint that flying saucers may have caused the crash (R. 859), and over our objection (R. 860) read from a book "The Flying Saucer Conspiracy", referring to the disaster at bar (R. 858-859). Neither the book nor its author's conclusions are in evidence. We can only feel that Transocean's references thereto not only were highly improper, but they demonstrate its own awareness that it has no defense. If it had, such airy speculation need never have been resorted to.

In Hardin v. San Jose City Lines, Inc., 41 Cal. 2d 432, 436, the Court states:

> "It is equally well settled, however, that an inference of negligence based on res ipsa loquitur arises in cases where a passenger on a common carrier is injured as the result of the operation of the vehicle and that the carrier is obliged to meet the inference by evidence sufficient to offset or balance it. (See Mudrick v. Market Street Ry. Co., 11 Cal. 2d 724, 731-734 (81 P. 2d 950, 118 A. L. R. 533); St. Clair v. McAlister, 216 Cal. 95, 98-99 (13 P. 2d 924); Smith v. O'Donnell, 215 Cal. 714, 721-722 (12 P. 2d 933); O'Neill v. City & County of San

Francisco, 209 Cal. 418, 420 (287 P. 449); Scarborough v. Urgo, 191 Cal. 341, 346 (216 P. 584); Dowd v. Atlas T. & A. Serv. Co., 187 Cal. 523, 531-532 (202 P. 870); White v. Red Mountain Fruit Co., 186 Cal. 335, 337-338, 340-342 (199 P. 318); Rystinki v. Central Calif. T. Co., 175 Cal. 336, 344 (165 P. 952); Housel v. Pacific Elec. Ry. Co., 167 Cal. 245, 247 (139 P. 73, Ann. Cas. 1915C 665, 51 L. R. A. N. S. 1105); Valente v. Sierra R. Co., 151 Cal. 534, 539 (91 P. 481); Cody v. Market St. Ry. Co., 148 Cal. 90, 92-93 (82 P. 666); Osgood v. Los Angeles etc., Co., 137 Cal. 280, 282 (70 P. 169, 92 Am.St. Rep. 175, 5 L. R. A. 498); Boyce v. California Stage Co. (1864), 25 Cal. 460, 467-469; Fairchild v. California Stage Co. (1859), 13 Cal. 599, 603-605.)"

We note the presence in this array of citations of the air carrier case Smith v. O'Donnell, 215 Cal. 714, where the Court states (page 722) that defendant must overcome res ipsa "by proof that there was in fact no negligence".

In Dierman v. Providence Hospital, 31 Cal. 2d 290, the Court states (page 295):

" . . . The general principle is, as stated by this court in 1919 (in denying a hearing in

Bourguignon v. Peninsular Ry. Co., 40 Cal. App. 689, 694-695 (181 P. 669)) 'that where the accident is of such a character that it speaks for itself, as it did in this case, . . . the defendant will not be held blameless except upon a showing either (1) of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident, in which cause no element of negligence on the part of the defendant inheres, or (2) of such care in all possible aspects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory in the sense that it covers all causes which due care on the part of the defendant might have prevented.'"

In the instant case reasoning by exclusion has eliminated bad weather (R. 58) and sabotage (R. 360), but on this record it has failed to eliminate the other causes which Respondents' due care might have prevented.

In Talbert v. Ostergaard, 129 Cal. App. 2d 222, the

Court states that if "defendant fails to produce substantial evidence of the use of due care, as where he fails adequately to disclose the nature of an inspection he was required to make, his defense may be held insufficient as a matter of law. (Chutuk v. Southern Calif. Gas Co., 218 Cal. 395, 399-400 (23 P. 2d 285); O'Connor v. Mennie, 169 Cal. 217, 226 (149 P. 674). See Dierman v. Providence Hospital, supra.)"

Tested by these rules, we believe that Transocean, as well as Slick, has failed to rebut the inference of negligence against them in this case. Neither has offered evidence of any explanation for the accident. Neither has offered evidence of care in all possible respects. Accordingly, we believe that judgment in their favor is error as a matter of law.

B. Inference Not Dispelled by Presumption of Due Care of Deceased Pilots

Where res ipsa applies, "The negligence which may be inferred is a sort of blanket negligence, spreading over the whole case, and requiring the defendant, if he is successfully to rebut it, to stop every gap through which an inference of negligence might be drawn." (Nysted v. Wings, Ltd., 51 Man. Rep. 63 (1942) 3 D. L. R. 336.) Thus the inference blankets every species of act or omission which could have caused the crash, not merely the conduct of the pilots. There is authority that the presumption of due care does not apply as against a

passenger in a carrier case (Parrot v. Wells Fargo & Co., 82 U. S. 524, 538.

That the inference is not dispelled is the inevitable conclusion to be drawn from Des Marias v. Beckman, 198 Fed. 2d 550 (Cir. 9) and Haasman v. Pacific Alaska Air Express, 100 F. Supp. 1. There the airliner disappeared without a trace, yet judgment was for plaintiffs based solely upon application of res ipsa. It is clear that many more elements enter into the sum total of an air carrier's exercise of proper care than the conduct of its pilots.

C. Inference Not Dispelled by Evidence of Specific Acts of Negligence.

Appellants' complaint alleges negligence against each respondent in general terms (V. 1, R. 1-13). At trial, we requested a ruling as to whether res ipsa applied in order that we might be guided in respect to the presentation of evidence (R. 6, 7, 89, 90). The Court ruled that res ipsa did not apply, and that we should proceed with the case (R. 90). Based upon that ruling, we adduced into evidence specific acts of negligence. We do not believe that this precludes our right to rely upon the inference of negligence raised by res ipsa.

In Leet v. Union Pac. R. R. Co., 25 Cal. 2d 605, cert. denied 325 U. S. 866, the Court states (page 619):

" . . . It must be concluded therefore that

if plaintiff alleges negligence specifically and generally he may rely upon the doctrine and the general inference of negligence flowing therefrom without limitation to the particular acts of negligence alleged inasmuch as by the general allegation of negligence defendant is notified that he must meet such a broad inference."

We note in passing that this was an action brought under the Federal Employers' Liability Act for wrongful death, applying the doctrine of res ipsa. We submit that the inference in our own case likewise was not dispelled.

III.

THE DISTRICT COURT ERRED IN FAILING TO GIVE APPELLANTS JUDGMENT BY REASON OF THE CLEAR PREPONDERANCE OF EVIDENCE.

A. Admiralty Appeal Authorizes This Court To Reweigh Evidence De Novo.

This is an admiralty appeal and in such Appellants are entitled to a trial de novo. As the familiar rule has been applied, this means that the decree of the District Court is deemed vacated and the evidence will be weighed by this Court anew. Where the findings below, as is the case here, are "clearly against the preponderance of evidence", they must be set aside for manifest error. Koehler v. United States (C.A. 7) 187 F.2d 933, 936; The Vinemoor (C.A. 9) 75 F.2d 28; Wilson v. Inter-Ocean SS Corp. (C.A. 9) 163 F.2d 459; Mullen v. Fitzsimmons and Connell Dredge & Dock Co. (C.A. 7) 199 F.2d 557, cert. den. 344 U.S. 933; The Ernest H. Meyer (C.A. 9) 84 F.2d 496, cert. den. 299 U.S. 600.

In the instant case the trial court's findings and judgment disregarded the clear preponderance of the evidence.

B. Specific Acts Tending To Show Negligence As Against Transocean.

1. Faulty Auto Pilot Maintenance. An auto pilot is an electronic system which automatically controls the airplane in flight (R. 201). Briefly, it works by means of a flight gyro spinning at high speed which produces signals which an amplifier interprets and transmits to surface controls (P's Ex. 21). Separately, an altitude control unit mounted in the amplifier automatically keeps the plane at a constant barometric pressure altitude (R. 220, P's Ex. 21). The altitude control is limited to 6^{o} change of pitch; the flight gyro is not so limited (R. 295).

N 90806 carried a PB-10 auto pilot and altitude control (R. 220, 255, P's Ex. 21). George McClain, Transocean's supervisor of operational training (R. 137), testified that "on long over-water flights the airplane is flown on auto-pilot, which necessitates very little attention from the pilots. In other words, they monitor the radios and see that everything is working O. K." (R. 145-146).

The flight logs for N 90806 disclose a long history of difficulty with the auto pilot. During the two-year period commencing June 26, 1951, its pilots recorded over 50 complaints or "squawks" relating to this flight control system (P's Ex. 13), including "auto pilot inoperative", "auto pilot very erratic", "auto pilot rudder NG", "auto pilot sluggish",

"auto pilot slightly jerky on elevators", "auto pilot unreliable", "Auto pilot inoperative, goes into immediate dive when engaged." (P's Ex. 13). Then come the following: May 27, 1953, "Auto pilot altitude control pushes nose down. Need elevator nose up trim to keep ship level" (R. 211); May 28, "Auto pilot oversensitive. When engaged has abrupt nose-down tendency" (R. 212).

Raymond E. Babb, Transocean's instrument man, attempted to correct these squawks by replacing tubes, rectifier and a bulb (R. 217). He did this after the airplane had passed through Burbank with no corrective action taken by Slick (R. 212, 215). In taking his corrective action, Mr. Babb assumed both squawks were the same (R. 227), although in fact they were separate complaints (R. 228). He knew that auto pilot amplifiers required periodic time changes (R. 229) but didn't know the time on this amplifier, and made no effort to find out (R. 229). The amplifier contains the highly critical flight gyro (R. 541). Mr. Babb readily admitted that the May 28 squawk above could have been due to something going wrong with the flight gyro. Yet the flight gyro was not checked (R. 230).

The operating specifications for N 90806 (P's Ex. 10, p. 1075) require the auto pilot amplifier to be changed every 2000 hours. William L. Keating, Transocean's vice president in charge of operations, testified that the time limitations

found in the operating specifications should be observed not only as a matter of good practice, but by requirement of the Civil Aeronautics Administration (R. 762). Civil Air Regulations, §42.5, makes the operating specifications a part of the air carrier's operating certificate and prohibits operation contrary thereto. Yet at the time N 90806 crashed, its auto pilot amplifier had over 2100 hours on it (P's Ex. 8). Not only did this exceed authorized operating limitations (C.A.R., §42.32(d)(1), but Slick's records show it was nearly as much as the last two previous overhauls of the same unit (P's Ex. 8), on the second of which records show the gyro roto bearings were found frozen (P's Ex. 30).

Mr. Babb further testified that in order to correct a "nosedown tendency" auto pilot squawk, he would first try to find out if the captain was operating with altitude control on or off, and that would "narrow the cause down" (R. 222). He admitted that he did not do that here (R. 222). Mr. Babb's work did not correct the fault, for on May 30 and May 31 two further auto pilot squawks appeared in the logs (R. 235).

On June 2, Mr. Babb overhauled the altitude control unit. This was Transocean's first experience at overhauling such a unit (R. 206), and likewise Mr. Babb's (R. 242). Ordinarily, it would be done by Slick (R. 210, 256). George Shaw, a Transocean inspector, testified that he was not familiar with the PB-10 auto pilot (R. 324-325) but witnessed

a ground run on the system, and based thereon cleared the squawk (R. 327). He had never before seen an overhaul of this type (R. 326, 330), and testified that the mechanical department "both overhaul and inspect its own work" (R. 328). The policy against this practice in connection with an article which is critical to safe flight is set forth in Civil Air Regulations, §52.45, and Civil Air Manual (C.A.M.) §52.45-1 (P's Ex. 28):

> "(c) Maintenance operations requiring a double inspection. Any maintenance operation which, if performed improperly, could be critical to the safe flight of an aircraft must be given a double inspection. The nature of the particular operation will be the governing factor in determining whether such operation shall be given a double inspection. A double inspection refers to that type of inspection wherein an article is repaired or altered by one individual and examined by a second individual in order to reduce to a minimum the possibility of error. Of the two individuals involved in a double inspection, only one need be a qualified inspector assigned for that purpose by the repair station. The mechanic accomplishing the particular maintenance operation may perform the first inspection; however, the

qualified inspector must perform the second or final inspection. Operations requiring double inspections include, but are not limited to, the following: * * * *

"(6) The overhaul or repair of any accessory used in the flight control system of an aircraft."

Mr. Shaw testified that it was his duty to see that the work was done and the flight squawk was corrected; that this meant finding the actual source of the trouble (R. 335). But here he hadn't seen Mr. Babb do the work (R. 333), and although he knew that other items might produce the same flight symptoms (R. 335), none were checked (R. 335-336). Although established flight check procedures exist (R. 336), no records of any flight check ever were produced (R. 337). And although Civil Air Regulations, §18.20, requires a detailed overhaul record of the work done, none was made here (R. 243).

The foregoing not only demonstrates the general character of Transocean's maintenance operation with N 90806, but also connects with the testimony of William A. Tracy, an expert witness for Appellants. Captain Tracy testified that an "abrupt nose down tendency" in an auto pilot may be expected to recur in the normal course of events unless fixed up, tested and inspected; that if the flight gyro should suddenly tumble, the airplane "just about goes out of control"; that bearings

last only so long and a burned out or frozen bearing would cause this (R. 269); that in one case he experienced the effect was so violent it tore seats loose and "tossed passengers to the roof" (R. 268). This testimony stands uncontradicted.

2. Inadequate Pilot Training. C. A. R., §42.45, provides:

> "Proficiency of crew members serving on large aircraft. Each air carrier shall establish a training program sufficient to ensure that each crew member used by the air carrier is adequately trained and maintains adequate proficiency to perform the duties to which he is to be assigned.
>
> "(a) The training program shall consist of appropriate ground and flight training, including all subjects contained in the Operations Manual. Procedures for each crew function shall be standardized to the extent that each flight crew member will know the functions for which he is responsible.
>
> "(b) No air carrier shall initially assign an individual as a pilot unless he has satisfactorily accomplished a written examination by the carrier to ensure his familiarity with the contents of the Operations Manual and with all types of instrument

approach and navigational facilities and procedures to be used. All pilots utilized by an air carrier shall accomplish such written examinations at intervals not to exceed six months.

" . . . "

C. A. M., §42.45-1, provides:

"(c) Emergency procedures. The training program shall include instruction in emergency procedures particularly with respect to engine failure, fire in the air or on the ground, evacuation of passengers, location and operation of all emergency equipment, power settings for maximum endurance and minimum range, etc."

Transocean's Flight Operations Manual states that C. A. R. §42.45 is "the minimum and not the optimum desired" (P's Ex. 9). Yet the record in this case shows discrepancies as follows:

(a) Captain William L. Word. Captain Word never took a course on DC-6 emergency procedures (R. 134). Captain Tracy testified that emergency procedures are very important to a pilot's operational qualifications. It trained him to detect trouble and to take steps to correct for it (R. 264). George McClain, Transocean's witness, agreed (R. 159). It is obvious that the accident in suit

presented an emergency situation.

(b) Co-pilot Herbert A. Hudson. Not only was Mr. Hudson absent from the course on emergency procedures, but he missed 30 out of 54 hours of instruction given on the DC-6 during the same period (R. 140-141). No other ground school course on the DC-6 was ever given (R. 140).

A written examination on the operations manual is required every six months. The manual contains a chapter on emergency procedures (R. 739). But Mr. Hudson's last such examination was June 10, 1952, 13 months before the accident (R. 755).

Defendants' Exhibit K shows that after being assigned to DC-6's, Mr. Hudson was transferred to DC-4's on December 1, 1952, and was reduced to co-pilot on March 1, 1953. He was retransferred to DC-6's April 1, 1953, and given his first flight check June 16, 1953. He failed, and the C. A. A. form of disapproval was placed in his file (P's Ex. 12). Transocean's chief pilot told Mr. McClain to work with Mr. Hudson and "bring up his proficiency" (R. 150). A revenue flight to Honolulu followed on June 17-18 wherein Mr. Hudson was co-pilot. McClain logged 14 hours of instruction for Mr. Hudson on these days, despite the fact that they were tired from the flight (R. 148). On July 1, 1953, Mr. Hudson was re-examined as to the oral portions of the examination, and

passed (P's Ex. 12).

3. Excessive Pilot Scheduling Inducing Fatigue.

(a) Inadequate ground rest. On July 10, 1953, N 90806 departed Oakland for Guam as Flight 109. It arrived at Honolulu at 1437 July 10, 9 hours 58 minutes later (R. 67). Captain Word and his crew were then waiting at operations ready to take over the flight (R. 676). A crew change was effected and the flight departed at 1740. It landed at Wake Island 8 hours 21 minutes later, departed Wake at 0301 with the same crew, and arrived at Guam at 0845 on July 11. The crew went off duty at 0905 (R. 67-68). Thus for the complete Honolulu-Guam trip the total flying time was 14 hours, 2 minutes, and total duty time was 18 hours, 28 minutes.

The same crew reported for duty at 2300, 13 hours, 55 minutes later (R. 69). Designated as Flight 512, N 90806 departed Guam for Oakland with this crew at 0004 on July 12. The flight landed at Wake Island at 0539, 5 hours, 35 minutes later. It departed Wake with the same crew at 0658 (R. 70-71) and crashed at approximately 0840 (R. 59). Thus out of 42:03 hours N 90806 had taken to get from Honolulu to Guam to the point of crash, Captain Word, Co-pilot Hudson, and Second Officer Nowell spent:

28:08 hours on duty;

22:19 hours aloft, and

13:55 hours off duty.

Under these circumstances, that these pilots were in a state of fatigue can hardly be doubted. Captain Keating testified that Transocean's Honolulu-mainland flights average about 9 hours (R. 741), and the crew taking the flight to Honolulu "would rest there normally a minimum of 36 hours" before flying again (R. 741). He considered this to be "good practice" (R. 746). If it was good practice at Honolulu, it is hard to see why it should not be good practice at Guam. Yet Transocean failed to follow that practice here.

Transocean's operations manual required that for a flight crew of 3 pilots, "flight hours shall be scheduled in such a manner as to provide for adequate rest periods on the ground" (R. 739-740). Lawrence E. Morehouse, called as an expert witness for Appellants, testified that he was a professor at U. C. L. A., a physiologist with a specialty in aviation medicine, and has completed broad studies in pilot fatigue (R. 299-300). Reports of his work had been published in the Journal of Aviation Medicine. He was a lecturer for the Air Force on flying fatigue (R. 301). When fatigue sets in, a pilot's standards of acceptance deteriorate, instruments are overlooked, response is slower and less accurate, and wrong judgments are made (R. 306-307).

In response to a hypothetical question describing the

instant case, Dr. Morehouse testified (1) that the pilots of N 90806 did not have an adequate rest period at Guam; and (2) that at the time of the crash they were in a fatigued state (R. 314).

(b) Inadequate Flight Rest Facilities.

Transocean's manual also required "adequate sleeping quarters on the aircraft" where 12 out of 24 hours were scheduled aloft (R. 740). Aloft time here was 14:02 hours within the last 24. N 90806 carried only one crew bunk (R. 174). Dr. Morehouse testified that this, too, was not adequate (R. 314). Captain Tracy, who had 17 years experience as an airline pilot (R. 260), testified that adequate rest was very important to safe flying, and this required facilities on the aircraft as well as ground rest; that usually 2 or 3 bunks are carried by aircraft with a multiple flight crew on over-water flights (R. 262-263). This testimony stands uncontradicted.

(c) Crew change indicated but not made.

Transocean's vice president in charge of operations, Captain Keating, testified that on trans-Pacific flights, "I consider it to be good practice" to change flight crews at Wake (R. 746). He testified Transocean had aircraft other than N 90806 flying regularly over the Pacific, and it wouldn't have been any particular trouble to ferry a relief crew out to Wake (R. 747).

Captain Tracy stated this was the usual procedure, so "a fresh crew would be on deck to take the trip" (R. 262). Captain Buckalew testified that this was a "sound practice" (R. 692). Yet Transocean failed to follow that practice here.

Captain Tracy testified that in operational malfunctions, a preliminary warning usually comes before the malfunction becomes critical to flight (R. 265); that during this period a pilot would start taking corrective steps (R. 265). It need not be labored that pilots who are in a fatigued state will not sense a forewarning as effectively as rested pilots. This is particularly so where the fatigued pilots have had no special training in emergency procedures. It is no wonder then that Dr. Gerundo, the autopsy surgeon, concluded that from what he found there was no evidence of forewarning (R. 186).

(d) Inadequate Preflight Action.

(i) No preflight check list received at Wake. Flight 512 landed at Wake Island at 0539, July 12. There the crew checked weather and filed a flight plan showing, among other things, estimated time of departure, 0730 (P's Ex. 26). Instead, the flight departed at 0658 (R. 57). Although a pilot's preflight check list is usually completed and delivered to ground personnel before take-off, this was not done here (R. 57, 715),

C. A. R., §42.31(a): "Aircraft shall be given a

preflight check to determine compliance with §42.51(e) . . . "

C.A.R., §42.51(e): "Prior to starting any flight, the pilot shall determine that the aircraft, all engines and propellers, appliances and required equipment, including all instruments, are in proper operating condition. If during the flight any such engine, propeller, appliance, or equipment malfunctions or becomes inoperative, the pilot in command shall determine whether the flight can be continued with safety. Unless he believes that flight can be continued safely, he shall hold or cancel it until satisfactory repairs or replacements are made."

Transocean's Flight Operations Manual (P's Ex. 9) provides that a "preflight inspection will be signed off and dated at each and every stop."; and again "Before any flight may be started, both the captain and dispatcher must agree that the flight may be accomplished with safety and in accordance with C.A.A. regulations. Their agreement shall be indicated by their signatures on the flight clearance."

C.A.R., §42.60(d): "No operation shall be conducted by the air carrier contrary to the safety provisions of the operations manual."

From the fact that N 90806 departed Wake 32 minutes early, it is a fair inference that departure was hurried. This

would explain why no preflight check list or clearance was signed off by the captain. But it can never justify it. Nor can Transocean, by saying their crew chief made a preflight inspection, show compliance with the plain intent of the foregoing requirements.

(ii) Cockpit check list squawked. The flight log for June 26, 1953, recites: "Replace T. A. L. (Transocean Air Lines) cockpit check list with Slick cockpit check list." On the reverse side appears: "No Slick list in stock" (P's Ex. 4).

> C. A. R., §42.25: "The air carrier shall provide for each type of aircraft a cockpit check list adapted to each operation in which the aircraft is to be utilized . . . "

The importance of proper check list in the operation of a complex mechanism requires no emphasis. This is particularly so where that mechanism is an airplane used in passenger common carriage. Transocean operated no DC-6 other than N 90806. That airplane came from Slick. Although the lack of a Slick check list was squawked, it nowhere appears that this discrepancy ever was corrected.

C. Specific Acts of Negligence as Against Slick.

1. Omitted Test Flights. Captain Tracy testified that usually an airplane is test flown after an engine

change (R. 264). Samuel Wilson, Transocean's executive vice president, agreed that normally the airplane is test flown around the field to see that everything is working properly (R. 363-364); also, that if the plane is released "O. K. for test hop", it would be good practice to test fly it (R. 363).

On July 2, 1953, Slick changed No. 4 engine on N 90806 (R. 45). Thereafter it was ferried to Oakland from whence it departed for Honolulu and Tokyo (R. 45-46). On the return trip the No. 4 engine seemed to lose power, and after arrival back in Oakland the plane was ferried to Burbank on 3 engines. There No. 4 was again replaced (R. 46-47). The flight log was signed off "O. K. for test hop" (P's Ex. 15), but no flight test as such was ever run (R. 48).

Usually, a flight test begins and ends at the same station (R. 364). Yet in neither of these engine changes was this done. As a result, discrepancies were first discovered in Honolulu on July 9, 1953, after the second installation (R. 50). No corrective action was taken there as to all but one item (R. 50), and none was taken by Slick after the airplane returned to Burbank. No reason appears why Slick omitted this servicing, other than that Transocean had scheduled the plane out of Oakland on July 10 (R. 52), and was probably in a hurry to get it. This was N 90806's last westbound flight.

2. Auto Pilot Amplifier Exceeded Authorized Time Limit. Slick had the history cards on this unit (P's Ex. 8). Its use was limited to 2,000 hours according to the operating specifications in evidence (P's Ex. 10, page 1075). This was the unit which contained the critical flight gyro (R. 541). Yet Slick permitted it to run over 2,100 hours at the time of the crash (P's Ex. 8), contrary to sound practice (R. 762) and law C.A.R., §§ 42.5, 42.51(a)(1), 42.32(d).

3. Omitted Maintenance. Maintenance of the auto pilot is required to be in accordance with the Pioneer Service Manual (Slick Maintenance Manual, page 4227, P's Ex. 11). The Pioneer Service Manual (P's Ex. 36) requires ground checks, preflight checks, flight checks, and periodic checks every 90 days to be made. It specifies the procedure for each. This record fails to show that these specific checks were accomplished. The May 27, 1953, squawk "auto pilot alt. control pushes nose down" came on a flight which terminated at Honolulu. There the ground crew released N 90806 to Burbank with the notation for this item on the reverse of the log sheet, "No action. O.K. thru". On the flight to Burbank the pilot noted in the log "Auto pilot over-sensitive, when engaged has abrupt nose down tendency" (R. 210-212). Nevertheless, Slick released the plane as airworthy to Oakland without any action on this item (R. 214).

As seen, the practice was for Slick to maintain the auto pilot, not Transocean (R. 255). From this it may be inferred that Slick's shops and mechanics were better equipped to do the job.

Slick purchased N 90806 from Douglas April 18, 1951 (R. 42) and sold it to Transocean on June 26, 1952 (R. 43). The log sheets in evidence show a long history of malfunction with the auto pilot, over 50 separate squawks within some 2 years (P's Ex. 13, R. 774-778). The same sheets show other complaints not expected when an airplane is properly maintained, e.g., December 20, 1951: "Filthy with oil"; December 30, 1951: "This airplane could use some maintenance"; February 16, 1952: "This airplane is so oily and dirty it is becoming a fire hazard"; May 22, 1952: "Auto pilot inoperative. Goes into immediate dive when engaged". On June 18, 1953, on a flight from Honolulu to the mainland, the No. 4 engine lost all fuel pressure after some 2-1/2 hours out. The pilot dumped 1000 gallons of fuel, and returned to Honolulu on 3 engines. On 8 separate flights of N 90806 during the 9 days before it last arrived at Honolulu, the logs show trouble with the No. 4 engine (P's Ex. 15). The log sheets for the trip thereafter went down with the airplane.

We do not believe that an airplane properly maintained, repaired and inspected will reflect the foregoing condition.

IV.

THE DISTRICT COURT ERRED IN MAKING CERTAIN FINDINGS OF FACT.

For brevity, the findings objected to will be set forth with the erroneous portions italicized. In all specifications the ground of objection is that they are unsupported by a preponderance (this being an admiralty appeal), or any, evidence.

Finding No. XIV: "No maintenance work of a mechanical nature was performed on said aircraft after its arrival at Guam on July 11, 1953, or while at Wake Island on July 12, 1953, as none was required or necessary."

Finding No. XVIII: "Take-off from Wake Island was at 0658, July 12, 1953. A total gross weight of the aircraft at take-off was 94,397 pounds, which was within the allowable gross take-off weight of 100,000 pounds; the load was properly distributed relative to the approved C. G. limits."

Finding No. XXI: "No primary structure of the aircraft was recovered; therefore, it was not possible to determine if a structural or mechanical failure of the aircraft occurred while in flight."

Finding No. XXII: "The aircraft received routine servicing on both the west and eastbound flights. There is no record of any mechanical trouble having been reported on

either of these flights. An examination of the records reveals nothing that would indicate that the aircraft was unairworthy when it left Wake Island. The maintenance records of the aircraft indicate that the aircraft had been maintained in accordance with CAA and Company approved procedures."

Finding No. XXV: "The crew were provided with adequate facilities for rest while in flight. . . . Prior to leaving Guam, the crew had rested adequately and were in a proper state of health to continue with their duties."

Finding No. XXVI: "When last observed on Wake, the crew was not suffering from fatigue, illness, worry or disability of any nature."

Finding No. XXVII: "Whatever occurred to cause the crash apparently occurred without giving any warning or opportunity for corrective action on the part of the crew."

Finding No. XXVIII: "The probable cause of the accident cannot be determined."

Finding No. XXIX: "The personnel of Transocean, which made up the crew on the fatal flight, were experienced, certificated, and well qualified to handle their respective duties. Transocean maintained a training program and periodically checked their personnel to keep them up to a high degree of proficiency."

Finding No. XXX: "Transocean compiled a voluminous manual on standard operating procedure patterned after the

CAA regulations and saw to it that their personnel lived up to the regulations."

Finding No. XXXI: "N 90806 was maintained by Slick in an airworthy condition."

Finding No. XXXIII: "Transocean was not negligent in the operation or maintenance, or otherwise, of N 90806."

Finding No. XXXV: "Slick was not negligent in the maintenance, or otherwise of N 90806."

Finding No. XXXVI: "N 90806 was maintained by Transocean in an airworthy condition."

Finding No. XXXVII: "N 90806 was in an airworthy condition when it left Wake Island at 0658, July 12, 1953."

V.

THE DISTRICT COURT ERRED IN FAILING TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW DISPOSING OF APPELLANTS' CLAIMS FOR LOSS OF BAGGAGE AND REFUND OF FARES PAID.

When Transocean sold passage to the parties in Guam, it contracted to transport them and their baggage to Oakland. For this Maria G. Muna paid Transocean $650.00 (round trip) for herself and $162.50 for her son, Francisco. Catalina M. Guiterrez paid $325.00. Value of the baggage was the subject

to testimony by members of the family on Guam (R. 408, 527).

The crash represents a clear case of deviation from the transportation contracted for, deviation compounded by Transocean's negligence. It resulted not only in the loss of the baggage, but in sudden and tragic death. "In the case of passengers, the carriers are responsible for negligence only; but in respect to their baggage, they are responsible as common carriers and accident is no excuse." (10 Am. Jur. 442).

Under the Death on the High Seas Act, only one cause of action exists for all pecuniary loss sustained by one's "wrongful act, neglect or default". The price paid for the tickets and value of the baggage, although relatively minor items, are nonetheless part and parcel of "the pecuniary loss". Appellants are entitled to recover therefor, and we believe that the Court erred in failing to find for Appellants on these issues.

CONCLUSION

For the foregoing reasons, the judgment in favor of Respondents Transocean and Slick should be reversed.

Respectfully submitted,

A. J. BLACKMAN,

Attorney for Appellants.